In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-797

JESSE FRANK BOWERS AND BEN T. PHILLIPS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Illinois, petitioners were found guilty on three counts of having knowingly received and sold stolen automobiles, which had travelled in interstate commerce, and on three counts of having conspired to commit the substantive offenses, in violation of 18 U.S.C. 2313 and 371. They were sentenced to three years' imprisonment on each count, to run concurrently. The court of appeals affirmed (Pet. App. A).

1. It is undisputed that petitioners, who owned the Economy Auto Sales in East St. Louis, Illinois, sold to good-faith purchasers three stolen automobiles, the

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serial numbers of which had been altered prior to the sales (Tr. 92, 221, 233). As the opinion below sets forth in detail (Pet. App. 2a–5a), petitioners prepared the necessary forms and affidavits for Illinois Certificates of Title, which were obtained upon presentation of Mississippi "Road and Bridge Tax Receipts" to the Illinois Secretary of State. At the time of the transactions involved here, Mississippi, a non-title State, issued a license tag and a receipt upon payment of a yearly tax to a Mississippi sheriff by any party claiming ownership of a given car. Other States ordinarily accepted the Mississippi tax receipt as indicative of ownership (Tr. 124–125, 131, 140–141, 156, 159). In the instant case, unknown to the purchasers, petitioners listed Mississippi residents, and not Economy Auto Sales, as the sellers (Tr. 97–100, 230, 236, 287–288).[1] In one of the sales, the Illinois purchaser was also listed as a Mississippi resident and his name was forged to the Illinois title application (Tr. 287).

After describing the three sales, the court below concluded (Pet. App. 5a): "The jury could rely on common sense in determining that the activities attributed to the [alleged and missing Mississippi sell-

[1] Two of these alleged sellers, Elsie Neal and Elaine Neal, were listed on the Mississippi "Road and Bridge Tax Receipts" as residing in the town of Slayden, Mississippi (Tr. 121, 249). Subpoenas for their presence at trial were returned by the United States Marshal marked "could not be found" (Tr. 280). The third alleged seller, Sam W. Williams, was listed on the tax receipt as residing at a specified address in Jackson, Mississippi. At trial it was established that the address was fictitious and that no Sam W. Williams could be found in Jackson (Tr. 371–372).

ers], were not an adequate explanation, consistent with defendants' innocence, of how they came to possess and deal with the three stolen cars."

2. Petitioners allege that they were denied due process and a fair trial by the government's exercise of peremptory challenges resulting in an all white jury (Pet. 12) and by the court's failure to select another jury panel or increase the number of blacks in the venire (Pet. 17). (There is no challenge to the fairness of the jury selection plan for the district.)

a. *The jury panel.* The Eastern District of Illinois encompasses forty-five counties, of which eleven are located in the East St. Louis area, where the events in question occurred and from which the jurors were selected. According to the 1970 census there are 494,031 whites and 74,007 blacks in the eleven-county East St. Louis area, approximately 87 percent and 13 percent, respectively, of the total population. St. Clair County, in which the court sat[2] and in which East St. Louis is located, is approximately 75 percent white, whereas East St. Louis itself is approximately 70 percent black (1970 United States Census Reports, Series PC–1(B), pp. 233–305.)

The jury panel in the instant case numbered thirty-two prospective jurors, of whom twenty six (81 percent) were white and six (19 percent) were black. Three jurors, one of whom was black,[3] were excused

[2] The court also sits in Benton, Cairo, and Danville, Illinois.

[3] This juror, a medical technician, was excused by the court upon presentation of a letter from her hospital supervisor that her services at the hospital were essential and no substitute technician was available.

at their request by the court prior to the jury *voir dire*.[4] Of the twenty-nine jurors called, twenty-four (83 percent) were white and five (17 percent) were black.

b. ***The trial jury.*** The defense peremptorily challenged ten prospective jurors, all of whom were white (Tr. 50, 58, 62, 70, 74). The prosecutor challenged five prospective jurors, four of whom were black (Tr. 47, 57, 80). The court excused two jurors, one of whom was black, for cause (Tr. 52, 65). All twelve jurors selected were white, four resided in St. Clair County and one, the jury foreman, resided in East St. Louis.

3. Petitioners, who are black, base their claim of discriminatory jury selection on the due process clause of the Fifth Amendment and the "impartial jury" clause of the Sixth Amendment. As the court below noted (Pet. App. 5a), however, *Swain* v. *Alabama*, 380 U.S. 202, held that the peremptory striking of blacks from a jury panel in a particular case does not itself demonstrate or suggest a denial of equal protection of the laws (380 U.S. at 221). That decision applies with equal force to claims under the Fifth Amendment due process clause. See *United States* v. *Pearson*, 448 F. 2d 1207, 1214, n. 15 (C.A. 5). To establish the denial of a fair and impartial jury, petitioners had to demonstrate either a pattern of racial discrimination by the prosecutor through the exercise of peremptory challenges over a period of time (see, *e.g.*, *Swain* v. *Alabama*, *supra*, 380 U.S. at 222–224; *Hollins* v. *Oklahoma*, 295 U.S. 394), or racial discrimination in the local plan for selecting grand jury or petit

[4] The trial transcript, including the transcript of the *voir dire* selection of jurors, has been lodged with the Clerk of this Court.

jury panels (see, *e.g.*, *Sims* v. *Georgia*, 389 U.S. 404; *Avery* v. *Georgia*, 345 U.S. 559). Here, there has been no such discrimination shown or alleged, and petitioners therefore have not been denied due process or their right to a fair trial. See *Swain* v. *Alabama*, *supra*, 380 U.S. at 221–222; *United States* v. *Carlton*, 456 F. 2d 207 (C.A. 5); *Lattimore* v. *Craven*, 453 F. 2d 1249, 1251 (C.A. 9); *United States* v. *Pearson*, 448 F. 2d 1207, 1213–1214 (C.A. 5); *United States* v. *Williams*, 446 F. 2d 486 (C.A. 5); *Brown* v. *Crouse*, 425 F. 2d 305 (C.A. 10). Hence, petitioners' reliance (Pet. 11, 14–16) on *Peters* v. *Kiff*, 407 U.S. 493, is misplaced. In *Peters* the petitioner challenged the *system* used to select the grand jury that indicted him and the petit jury that convicted him.

Moreover, petitioners' argument (Pet. 12) that a local black on the jury could have enlightened the jurors on the automobile market practice in East St. Louis amounts to pure speculation. And in any event, such a practice is a matter that petitioners could have sought to prove at trial if it were deemed important to their defense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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